

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

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4-7-2008

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
Plaintiff,

v.

TERRY YOUNG,
Defendant.

Case No. 97CR63

Judge George W. Linberg

08CV1999

JUDGE LINDBERG

MAG.JUDGE NOLAN

MOTION TO VACATE, CORRECT OR SET ASIDE SENTENCE

PURSUANT TO 28 U.S.C. §2255

MOW COMES the defendant and pro se litigant Terry Young, and moves this Court to grant his Motion To Vacate, Correct or Set Aside Sentence Pursuant To 28 U.S.C. §2255 and, in support thereof, states as follows:

I. Introduction

Defendant Young elects to proceed pro se in this petition.

The right to defend in a criminal court proceeding belongs exclusively to the accused defendant, not his lawyer. See, Faretta v. California, 422 U.S. 806 (1975). The Supreme Court held that an accused has a Sixth Amendment right to conduct his or her own defense in a criminal case. Id. at 821.

When (as here and now) a defendant invokes his right to self-

representation, the court may appoint standby counsel to assist the defendant with basic courtroom mechanics. Id. at 834 n.46. In addition, this Court is required to construe pro se complaints and petitions liberally. Such pro se complaints and petitions are held to a less stringent standard than those drafted by attorneys so as to allow a pro se litigant to develop a potentially meritorious case. See, Haines v. Kerner, 404 U.S. 519 (1972); Neitzke v. Williams, 490 U.S. 319, 324-25 (1972); Huges v. Rowe, 499 U.S. 59 (1980).

Finally, when a federal court is evaluating a pro se complaint or petition, the pro se litigant's allegations are assumed to be true. Fine v. City of New York, 529 F.2d 70, 74 (2d Cir. 1975).

II. Argument

A. The Failure Of The Courts To Comply With Supreme Court And Circuit Court Precedents, Disregarding Intervening Changes In Circuit Law, Ignoring A Congressional Statutory Mandate, All Resulted In A Fundamental Miscarriage Of Justice, Warranting The Count One Vacation Of Judgment Or, Alternatively, Reduction In Sentence Length

There exist extraordinary and compelling reasons related to sentencing proceedings (below and erroneously affirmed above) that warrant, at the very least, a significant Count One sentence length reduction, rooted in both (long-established) statutory and (then mandatory) sentencing guidelines requirements.

Consider these incontrovertible facts:

1- This Court, in a dispositive judicial admission, made the following declaration in U.S. v. Young (Mansoori), 480 F.3d 514, 518 (7th Cir. 2007):

"However, in the absence of a proven drug amount, the default maximum prison term is twenty years, Section 841(b)(1)(C). In this case, the conspiracy charge set forth in Count One of the indictment did not allege, and the jury was not asked to [and did not] find, that the amount of drugs involved in the conspiracy met or exceeded the statutory threshold for a life term. **The jury's verdict therefore did not support a sentence in excess of twenty years.** [emphasis supplied].

Nonetheless, we concluded that the error did not implicate the integrity and fairness of the judicial process so as to warrant relief under the plain error standard."

The appellate court had previously conceded that it (as will be documented in what follows, erroneously) believed "that none of the defendants had raised the [Apprendi/Sixth Amendment right to a jury trial drug quantity determination] issue in the district court." Id. See also, Young (Mansoori), 304 F.3d at 657. In fact, Young had indeed and very specifically so, raised the issue at sentencing.

For the record, the circuit court merit panel that rendered the appellate court opinion in Young (Mansoori) I, supra, 304 F.3d 635, consisted of Judges Bauer, Rovner and

Wood, authored by Rovner. The merit panel in Young (Man-
soori) II, supra, 480 F.3d 514, consisted of Judges Bauer,
Rovner and Manion, again authored by Rovner.

2- Surely this Court (and the appellate court) is well-
aware of the rule of Apprendi v. New Jersey, - 530 U.S. 466
(2000), which held that "any fact other than the fact of a
prior conviction that increases the penalty for an offense
beyond the statutory maximum penalty for that offense is an
element of the crime and so must be submitted to the jury and
proven beyond a reasonable doubt."

Facts like drug quantity and drug type, for example.

Facts admitted by the appellate court, as having not been
determined by jury verdict in this case. Conceded Apprendi
errors.

3- Exactly seven (7) years ago to the month (March 2001) in
an opinion that was endorsed by ten (10) appellate court
judges, including all five (5) of the judges who authored both
Young opinions, another three (3) judge panel consisting of
Judges Ripple, Manion and Kanne, authored by Kanne, estab-
lished circuit law precedent in applying the Apprendi principle
to drug conspiracy cases exactly like this one!!

The case was and is entitled U.S. v. Jones, 245 F.3d 645
(7th Cir. March 2001) (collecting cases).

4- Jones was an intervening change in circuit law, an appli-

cation of the Apprendi principle.

The controlling case on the retroactivity of an intervening change of circuit law is Davis v. U.S., 417 U.S. 333, 341-42 (1974). The Davis Supreme Court held that a change in the law of the circuit after a petitioner's conviction would entitle the petitioner to a new hearing under the new law. Davis, 41 L.Ed. 2d at 117.

5- The Seventh Circuit Jones Court issued with unmistakable clarity, a very specific prohibition against using drug quantities not charged by indictment and not determined by jury verdict, even while invoking the plain error standard of review (which was applied in (Young/Mansoori, supra, 480 F.3d at 518)), as the basis and justification for pronouncing (by a district court) and affirming (by a circuit court of appeals) statutorily enhanced sentences, regardless of the actual (even if overwhelming) drug quantity evidence of record. Jones, supra at 648. Indeed, quoting Jones very specifically, "Because no drug amounts were included in the jury instructions for this Count, Apprendi requires the statutory maximum for this offense to be determined without reference to any quantity of controlled substance." Id. at 649.

6- As relates to the intervening Jones (and others) circuit case law precedents, following Apprendi which became applicable to this case during the pendency of my direct appeal proceedings, neither drug quantity nor type was charged or determined

by grand jury finding, or determined by trial jury finding and therefore, in accordance with applicable Supreme Court and circuit court law, the **default statutory maximum** penalty when (as the grand jury indictment and trial jury instructions read with unmistakable clarity) only "a **measurable amount of [various] drugs [by type]**" is determined, is governed by **section 841(b)(1)(C)**, the maximum penalty being **20 years**.

7- Section 841(b)(1)(C) became statutory law, legal precedent, in 1970, approximately 30 years before the circuit court's initial direct appeal opinion. It was long-time, well-established law all along, with no appreciable language change since 1970. Section 841(b)(1)(C) is a Congressional mandate.

The presumption here would be that both the district and circuit courts knew this to be fact, and had an obligation to sua sponte apply the law fairly and correctly, even if not asked to do so!

8- Intervening changes in the law of the Seventh Circuit requires that my sentence be vacated on Count One.

9- In United States v. Mietus, 237 F.3d 886 (7th Cir. 2001), yet another intervening change in circuit law, the Seventh Circuit held for the first time that the jury must be instructed that drug type and quantity were elements of a drug offense which the prosecution must prove beyond a reasonable doubt.

Id. at 875. See also, U.S. v. Brough, 243 F.3d 1078 (Cir. 2001); U.S. v. Westmoreland, 240 F.3d at 631-633 (7th Cir. 2001).

10- The due process clause requires the government to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. In re Winship, 379 U.S. 358, 364 (1970); Apprendi, supra. Consistent with that principle, if the government fails to sustain the burden of proof on any element, the defendant is to be acquitted of the charge. Winship, 379 U.S. at 363. See also, U.S. v. Jackson, 33 F.3d 866, 869 (7th Cir. 1994).

11- A criminal defendant must likewise be acquitted when the court fails to instruct the jury [as here] on any element that the prosecution must prove beyond a reasonable doubt. U.S. v. Gaudin, 515 U.S. 506 (1995); Cool v. U.S., 409 U.S. 100.

12- Finally, be also advised that the maximum base offense level of the Sentencing Guidelines for a "measurable" (or determinate) amount of drugs as charged by grand jury indictment and determined by trial jury verdict in this case, was and is offense level 12, when the offense involves heroin, cocaine, cocaine base (crack) Schedule I and II opiates and stimulants.

Accordingly, for all of the aforementioned reasons, Supreme and circuit court precedents should be followed without hesitation or reservation and the relief requested should be granted.

B. The District Court Erred In Finding That Defendant Young's Apprendi-like, Jones Objection Was Untimely And Without Merit. The Circuit Court Compounded The Lower Court's Error By Adopting And Not Correcting It

On the date of defendant Young's sentencing hearing, September 22, 1999, prior to sentencing pronouncement, with the sentencing court's permission and the government's acquiescence (AUSA Hersh indicating that he had received and read, and was prepared to respond orally), counsel Ellis for defendant Young submitted a very brief (5.5 page supplemental sentencing) memorandum making an Apprendi claim before it subsequently (9 months later in June 2000) became known by the Apprendi name, citing as his authority the precursor to Apprendi and Apprendi's progeny, Blakely, Booker, Nance, etc., -- the Supreme Court's decision in Jones v. U.S., 526 U.S. 227 (March 24, 1999); Young, Case No. 97 CR63, September 22, 1999, Tr. 5-11, Judge George W. Lindberg

Defense counsel Ellis argued that Jones, at that point in time as an intervening change in and new rule of constitutional law from the Supreme Court, was applicable to Young's case, and that Jones held as follows:

"Under the due process clause of the Fifth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, any fact other than prior convictions that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Tr. 7, Lines 3-8.

The aforementioned words became virtually the exact text of Apprendi and its progeny some nine(9) months later. This Court subsequently conceded - a judicial admission - that "Young's counsel did file a written objection that quite accurately predicted Apprendi's holding." Mansoori II, Slip Op. @ 13.

In U.S. v. Nance, 236 F.3d 820 (7th Cir. 2000), this Court held that a Jones claim was sufficient notice to the district court "that serious questions could be raised about the proper characterizations of aggravating factors under many statutes" and that as far back as 1997 [(the U.S. v. Edwards, 105 F.3d 1179 (7th Cir. 1997))] legal practitioners knew that elements of an offense (such as drug type and quantity) had to be proven to the jury beyond a reasonable doubt.

And what was the government's response to defense counsel's contention? AUSA Hersh:

1 - "The entire premise of the defendant's motion --- We just disagree with that," Tr. 8, and

- 2 - " --- We are asking that you deny the motion. We don't believe it has merit," Tr. 10, and
- 3 - "But I don't think your Honor should grant the motion." Id.

The aforementioned was the government's official position at sentencing, on September 22, 1999. By October 3, 2002, however, post-direct appeal, in response to defendant Young's Petition For Rehearing to the Seventh Circuit Court of Appeals on the Count One (conspiracy) sentences the government declared— a judicial admission— that "the district court in accord with Apprendi may not impose a sentence in excess of 20 years." G. Br. @ 2.

Obviously, by then the government knew that Young's claim did have merit, and that the imposed life sentences by the district court, given the evidence of record, was not legal or proper.

And the district court's response? Following the government's sentencing hearing suggested course, declining to make an independent assessment, Judge Lindberg said:

- 1 - "Okay. That (what the government wanted, contrary to what the Supreme Court in Jones dictated) is the view of the Court. First of all, it will be denied as untimely ---," Tr. 10, and
- 2 - " --- I said both untimely and on the merits." Tr. 11

The Apprendi rule became the universal law of the land during the pendency of Young's direct appeal which, technically speaking, is still pending. In Mansoori I, 304 F.3d 635 (7th Cir., August 29, 2002) this Court conceded that the imposed Count One conspiracy conviction life sentences amounted to Apprendi error. Id. @ 657. At that point (August 2002), surely the Court knew, that the

District Court's assessment that Young's counsel's Apprendi claim lacked merit, was clearly erroneous. This Court also knew (or should have known by then upon simple review of the sentencing hearing transcript, a material piece of evidence) that Young had indeed timely preserved a meritorious Apprendi claim.

How could the Court not know that, without committing a Patterson v. Crabb, supra — type error, one that overlooked a final judgement order, the type of error that now screams aloud for a recall of mandate, if circuit law precedent is going to be consistently (rather than selectively) applied without regard to race, creed, color or religion??

The district court's untimeliness finding was clearly erroneous, too.

In Mansoori II, Slip Op. @ 14, the Court held that Young's Apprendi-like, Jones objection was filed "beyond the deadline set by the district court for objections to the probation officer's pre-sentence report." There was legitimate reason for that. How could it possibly have been done otherwise?

In the first place, the Court, the district court and the government knew (or should have known), that the latest (there were 3 in all) district court deadline for defense filing objections, as confirmed by the case docket of proceedings records, was January 11, 1999, some 8 months before the sentencing hearing, and 2 months before the Jones opinion was announced! See, Docket Sheet Nos. 423 (6/10/98), 440 (7/24/98), 460 (11/18/98) and 530 (1/11/99)(Objection filing deadlines).

How possibly, then, could defendant Young have filed "timely", pre-filing deadline, a non-existent Jones claim, before Jones ever came into being? Jones was an intervening change in Supreme Court law, that was handed down between Young's trial and sentencing, and after the last of 3 objections filing deadlines had passed, that became an applicable legal precedent prior to sentencing and on direct appeal.

In the second place, surely neither the district court nor the government could claim surprise over, or lack of familiarity with, the existence of the Jones holding at the time of sentencing, as it was 6 months old at that time and legal precedent then.

Quite contrary to the district court's threshold determination, endorsed by the Court, Mansoori II @ 14, Young's Jones objection was timely made, had undeniable merit and the Court should have so held. For these reasons standing alone (and there are more), Young is entitled to de novo re-sentencing relief on Count One, the drug conspiracy charge.

C. Defendant Young Timely And With Sufficient Specificity Made And Preserved An Apprendi Claim Below. Young Is Therefore Entitled To Be Re-Sentenced De Novo On Conspiracy Count One, And The Court's Law Of The Case Doctrine Finding To The Contrary Should Be Set-Aside

We start with the last point, and there is ample circuit law authority, aside from the fact that undisputable evidence warrants it, to support and justify our request.

Unless there is some good reason for reexamining it or some other special circumstance warranting reexamination of the issue

(such as a new rule of constitutional law --- that was previously unavailable, or newly discovered material evidence, or the prior decision was clearly erroneous and would work manifest injustice, or controlling authority has since made a contrary decision of law applicable to the issue, etc.), once the Court has decided the merits of a ground of appeal, that decision establishes the law of the case and is binding on a district judge asked to decide the same issue in a later phase of the same case. See, U.S. v. Mazak, 782 F.2d 580, 581 (7th Cir. 1986); U.S. v. Fuller, 398 F.3d 644, 648 (7th Cir. 2005).

Quite clearly then, there are exception situations [as will be demonstrated here] where the law of the case doctrine is not binding.

With respect to the issues of Apprendi-claim timeliness, merit, preservation below and properly applicable standard of review, the Court's expressed findings were demonstrably erroneous, and has worked a manifest injustice on defendant Young. See, Sections B, C and D.

The aforementioned sections documented the Court's law of the case decision as being clearly erroneous and a manifest injustice. Defendant Young cannot be blamed, it was'nt Young's fault, that the Court failed to recognize that which was repeatedly, publicly and in writing (at least four(4) times) presented, uncontrovertible documentary evidence that Young had indeed preserved below his Apprendi argument, and all defendants had timely presented their Apprendi claims on direct appeal, yet this

Court failed to peruse it. Using an age-old axiom, "you can lead a horse to water, but you can't force the horse to drink." Young put his Apprendi claim front and center in the Court's face(s). What more could he do? As a matter of fact, the Court publicly acknowledged that it had not even considered whether Young had preserved the Apprendi claim. See, Mansoori II, ante 13.

Amazing. Disappointing and depressing, too.

The Court, despite all of the aforementioned points of undisputable fact and circuit law precedent, also questioned [i.e., declared "it is debatable] whether Young actually did preserve the [Jones/Apprendi] argument". Mansoori II, Slip Op. @ 13. This expressed sentiment was alarming, stunning and most regretable. The evidence of record confirmed Apprendi issue preservation with unmistakable clarity. No ambiguity whatsoever.

The Court correctly conceded that if the defendants were to be re-sentenced de novo, as if the original sentence had never occurred, the district court would be bound by Apprendi, and in the absence of a jury finding as to the relevant drug quantity, the lengthiest prison term that the court could impose on the [Count One] conspiracy charge would be 20 years. See, Mansoori II, Slip Op. @ 3, 5; Mansoori I, 304 F.3d @ 659.

The Court also declared, for issue preservation purposes, that defendant Young's objection relied on Jones v. U.S., 526 U.S. 227, 143 L.Ed 2d 311, 326 n.6 (1999).

Not exactly true!

While Jones was indeed cited, a reading of the Sentencing

Hearing Transcript, Tr. 7, and Supplemental Sentencing Memorandum and Objections (to the PSI Report) of September 22, 1999, pages 1, 2, makes it bountifully clear that defendant Young relied upon (and explicitly declared he was relying upon) his constitutional rights under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment. Young's counsel's direct quote:

"Any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

That, Honorable Jurist, is Apprendi before Apprendi ever was a matter of public law. The issue could not possibly have been better preserved below, pre-Apprendi.

Now, would'nt ANY distinguished merit panel of jurists suppose that was good enough to confirm issue preservation below? Just in case you don't, let me share with you what some of the Court's peers have had to say about the same issue:

1 - In the case of Trevor Bjorkman, et al, U.S. v. Bjorkman, 270 F.3d 482, 489, 492 (7th Cir. 2001), circuit judges Easterbrook, Kanne and Bauer (who served on the Mansoori I direct appeal merit panel) held, conversely, that defendants who made Apprendi-like arguments at sentencing (on September 25, 1999; they were charged June 3, 1999 by indictment pre-Apprendi) do not forfeit (i.e., they adequately and timely preserve) the issue and thereby restrict this Court's review to a search for plain error. Bjorkman did not, as Young did so, challenge ascertaining drug quantity using the reasonable doubt standard.

2 - In U.S. v. Messino, 382 F.3d 704 (7th Cir.2004), circuit judges Bauer, Easterbrook and Kanne unanimously agreed that defendants Messino (brothers Dick and Clem) had adequately preserved their Blakely claim and therefore the Court's review was not limited to a search for plain error, because both Dick and Clem Messino advanced in their opening briefs arguments based on Apprendi v. New Jersey, 530 U.S. 466 (2000), which led to Blakely and Booker.

These judges declared that neither Messino brothers developed those arguments at length in either the district court or in their appellate briefs, as defendant Young (and his co-defendants did in the latter) did in both the district and circuit court, respectively, pre- and post-Apprendi. Id. @ 714-15.

Judge Easterbrook went on to say that ---

- a) when precedent is adverse (as was the case at Young and his co-defendants' sentencing dates), a few sentences flagging the point suffice to preserve an argument for resolution by a higher court, and
- b) when Apprendi-based arguments are properly preserved [as here by Young], relief is appropriate because such an error (Booker, Blakely or Apprendi) is not harmless, and
- c) Apprendi error does not justify reversal under the plain-error standard ---

Of course, which ought to be obvious and is the salient point in this petition, plain-error was the inappropriate standard of review in defendant Young's case appeal. Yet another Court error that could and should be corrected on a recalled mandate *or now, on this SECTION 2255 petition.*

3 - In U.S. Humphrey, 287 F.3d 422 (6th Cir. 2002), a distinguished panel of merit judges from the Sixth Circuit Court of Appeals, ___ Moore, ___ Cole, Jr., ___ Rosen, rendered the following findings of fact regarding claim preservation and applicable standard of review:

a - defendant Montel Humphrey was entitled to retroactive application of Apprendi rule; his appeal was pending at the time Apprendi was decided.

Humphrey (like Young) was sentenced in 1999 prior to Apprendi, and only made a formal Apprendi objection in his appellate brief in 2001. As the Court is well aware (or, as the undisputable, documentary evidence of public record confirms), Young made Apprendi objections below (in 1999 pre-Apprendi) and above (in the circuit court in 2000 pre- and post Apprendi), and

b - defendant Humphrey through his attorney preserved his objection on the basis of Apprendi error, such that de novo review applied on appeal, even though counsel never used the word "Apprendi"; the district court was apprised of the objection, and offered an opportunity to correct it, by a combination of the substance of defendant's objection to drug quantity determination and the objection of the standard of evidence review to be used, Id. @ 445-46 (collecting supporting cases from the Third, Fourth, Ninth and Eleventh Circuits, respectively), and

c - where [as here] a defendant raises a cognizable Apprendi challenge in the district court, and raises it again on appeal [as did Terry Young], Court of Appeals reviews the Apprendi issue

de novo; however, if a defendant fails to raise the issue in the district court, or abandons it on appeal [Young did neither, he raised it in both courts], Court then and only then reviews for plain error.

This Court also stated that "Young's contention that he preserved the Apprendi argument by raising it at sentencing [thus] depends on us ignoring the district court's threshold determination that the argument was not timely made." See, Mansoori II, Slip Op. @ 14.

And why should'nt the Court ignore the district court's threshold determination? The lower court was 100% wrong! See, Section B, Pages 5-8 of this petition. Young's clear and unambiguous objection made orally and in writing at sentencing, was based on allegations of violations of his Fifth and Sixth Amendment constitutional rights, which have been federal law since July 4, 1776! How possibly could such claims be untimely (and their requirements unknown to an impartial, bias-free district court judge) in September 1999??? The Jones and Apprendi cases were a (not the only) reference source precedent(s) for the Fifth and Sixth Amendments to the U.S. Constitution.

Finally, as legitimate grounds and reason for apprehension and suspicion, the Court (Judge Rovner writing for the 3 member merit panel) stated ominously that ---

a) "even if Young did preserve his Apprendi argument, contrary to our assumption in Mansoori I, it would make no difference in terms of Young's entitlement to relief," and...

b - it "makes no difference in so far as Young is concerned (that we rendered this assessment on plain error review)". See, Mansoori II, Slip Op. @ 16.

Respectfully begging to differ, but it would make one hell of a difference, and the Court itself explained what the "difference" was in Mansoori II, Slip Op. @ 15. That key, dispositive difference lies in the assignment (between the government and defendant) of the burden of persuasion — who has to prove that the consensus — conceded Apprendi error was, or was not, prejudicial. The Court obviously knew that all along.

This "burden" assignment decides who wins or loses the preserved Apprendi error appeal. Plain error analysis clearly (and unfairly and illegally in this instance) favors the government.

As will be elaborated on in greater detail in Section D that follows, pages 18, 19, well-established circuit law precedent mandates that Apprendi errors in both the indictment and jury instructions are subject to harmless error analysis. The Court mistakenly (by its own admission) applied the more stringent, government favorable (when Apprendi claims are involved) plain error analysis.

And that makes "no difference in terms of Young's entitlement to relief"? And why is that so? Is (or is'nt) the Court saying that the requirements of its own (circuit) law, doesn't matter simply because Terry Young is the defendant???

Under circuit law, harmless error analysis is reserved

for those errors objected to in the district court, and **plain error** analysis is reserved for and applied only to those errors not raised in the district court.

Surely this Court would (or should) concede, there can be no legitimate dispute (the evidence of record would'nt allow it), that Terry Young's counsels timely and with great specificity, preserved his Apprendi claim, regardless of what the (drug quantity) evidence of record indicated to the reviewing panel of circuit court judges. The jury did not make such a determination, and the jury has ultimate authority in making such a determination if the penalty (sentence length) is to exceed 20 years pursuant to 21 U.S.C. 841(b)(1)(C). They did'nt. It should'nt.

That is the Apprendi/Nance rule, the law of the land including the Seventh Circuit. The only question here is, is it going to be applied fairly and equally to Terry Young as it is to all (or most) other defendants convicted of the identical crime(s). That is the question.

Again, is (or is'nt) the Court suggesting that an exception to the rule of circuit law, that it actually "makes no difference" (what the law demands) simply because Terry Young is the defendant??

D. The Circuit Court Erred In Applying Plain Error Analysis To Defendant Young's Timely Preserved Apprendi-like Claim. Young's Claim And Sentence Should Have Been Subject To Harmless Error Analysis And Plenary Review

In Mansoori I [304 F.3d 635 (7th Cir. 2002)] the Court determined that the imposition of life sentences on the defendant's conspiracy convictions amounted to Apprendi error, because the jury

had not made a finding as to the amount of narcotics involved in the conspiracy that would authorize a prison term of life. 304 F.3d @ 657. Believing [erroneously] that none (including Terry Young) of the defendants had made an Apprendi-like argument below, the court reviewed the Apprendi challenge for plain error only [a highly prejudicial mistake], and concluded under that (the wrong) standard, relief was not warranted. See, Mansoori II, Slip Op. @ 2.

As elaborated on in Sections B and C, respectively, of this ~~relief~~ request petition, defendant Young's Apprendi claim was improperly subjected to plain error analysis rather than properly to harmless analysis, and he was entitled to plenary review of the conceded (by the government and Court) Apprendi sentencing error.

"It is now well-established in this circuit that Apprendi errors in both the indictment and the charge to the jury are subject to harmless error analysis". See, U.S. v. Adkins, 274 F.3d 444, 454 (7th Cir. 2001)(collecting cases).

Harmless error analysis is reserved for those errors objected to at trial (below, in the district court), while plain error analysis is applied to errors not raised at trial (in the district court). See, U.s. v. Burke, 425 F.3d 400, 416 (7th Cir. 2005) (Burke preserved his argument below by objecting to his sentence on the grounds that it violated Apprendi v. New Jersey, 530 U.S. 466 (2000), thus the review is for harmless error); U.S. v. Schlifer, 403 F.3d 849, 853 (7th Cir. 2005)(The doctrine of plain

error applies when a defendant forfeits a ground in the district court but raises it on appeal); U.S. v. Pawlinski, 374 F.3d 536, 5640 (7th Cir. 2004)(same). Otherwise, the appellant is entitled to plenary review of a sentencing error. Schlifer, supra @ 854

An error is harmless only if it did not affect the district court's choice of sentence. Schlifer [citing U.S. v. Smith, 332 F.3d 455, 460 (7th Cir. 2003)]. Being subjected to plain error analysis, Young's maximum (and actual) sentence was **life without parole**. Had Young been subjected to harmless error review, his maximum sentence could not have exceeded 20 years.

Quite clearly, this Court's error was not harmless!!

The Court explained in Mansoori II, Slip Op. @ 15, that "the relevant inquiry on harmless review in Apprendi cases is the same inquiry posed on plain error review," citing Nance, 236 F.3d @ 825.

This rationale misses the point completely, that point being the "contemporaneous objection rule" and the benefit that is suppose to be derived therefrom. See, Turner v. Murray, 476 U.S. 28, 37 (1986). Again, plain error analysis and its burden of persuasion obligation is the salient (and obviously overlooked) point here. In U.S. v. Larson, 417 F.3d 741, 747 (7th Cir. 2005), the defendant (Palmer, as did defendant Young here) raised the issue below by challenging the district court's sentencing enhancements on the basis of Apprendi v. New Jersey, 530 U.S. 466 (2000). The Court held, under these circumstances, the government had the burden on appeal of establishing that the error was harmless.

Judge Bauer, joined by Judges Wood and Ripple, authored this opinion. Now, compare this opinion holding with the Mansoori I opinion issued by Bauer, Wood and Rovner. In that opinion, the burden of persuasion was shifted to defendant Young. Harmless error analysis for Palmer, plain error analysis for Young.

In Mansoori II the Court pointed out the key distinction between the harmless error and plain error analysis lies in the assignment of the burden persuasion — in plain error cases, it is the defendant's burden to prove that the error was prejudicial, whereas in harmless error cases it is the government's burden to prove that the error was not prejudicial. Slip Op. @ 15. See also, U.S. v. Larson, 417 F.3d 741, 746047 (7th Cir.2005)(recognizing that the government bears the burden of establishing that error was harmless). Because [as here] the court's error in Burke, supra was not harmless, the Court vacated Burke's sentence and remanded for resentencing.

Had the proper [in this case] standard of review [harmless error analysis] been applied in this case, in no way, there was no way possible, with the burden of persuasion on the government, could the government have proven using any standard of proof ...

1) that the imposed Count One sentence (life without parole based on a plain error analysis) did not fatally prejudice Young (who would have been entitled to the default statutory maximum penalty sentence of 20 years), and

2) that Young's sentencing hearing claim below did not mirror exactly the rule of Apprendi (before the Apprendi name

became public information) and, therefore, a finding regarding Young's Jones/Apprendi claim to the contrary by the court below, endorsed by the Court, did not unfairly prejudice Young, and

3) that the lower court's claim, embraced by this Court, that Young's Apprendi claim was untimely and without merit, did not fatally and unfairly prejudice Young.

The government could never have proven any one on the three(3) aforementioned points.

Defendant Young suspects that res judicata considerations from the Mansoori I opinion, and the government's interests in maintaining an illegally imposed life sentence on Count One (conspiracy), somehow seeped into and infected the Court's decision, to apply the wrong (plain error) analysis standard of review, so as to unfairly favor the government's objective.

Well-established circuit law expressly prohibits court-declared speculation about drug quantity estimates. See, U.S. v. Nichols, 75 F.3d 1137, 1143 (7th Cir. 1999); U.S. v. Ferguson, 35 F.3d 327, 333 (7th Cir. 1994); U.S. v. Westmoreland, 240 F.3d 618, 630-32 (7th Cir. 2001). See also, Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)("There has been no [drug quantity] jury verdict within the meaning of the Sixth Amendment", and no amount of "appellate speculation about a hypothetical jury's action" can remedy this error)

After trial proceedings have ended, a jury verdict has been reached and the trial jurors dismissed, no judge, no person alive, in conducting a post-trial review and analysis of the evidence,

can say with absolute certainty beyond a reasonable doubt, whether all trial jurors, each and every one, believed some, half or all of each and every witnesses' testimony. It would be impossible to know, even for learned circuit court judges. That is why, as it should be, that judicial speculative analysis of the evidence of record is frowned upon. It could not possibly be reliable beyond a reasonable doubt. It should never be a substitute for a trial jury's actual verdict. It is contrary to the rule of Apprendi and it's progeny. See also, U.S. v. PARMELEE, 42 F.3d 387 (7th Cir. 1994) (Anti-Appellate Court speculation).

The Mansoori Court's speculative conclusions aside after their analysis and review of the evidence of trial record, and speculative projections as to what a properly instructed jury might (or might not) have found (but didn't find) regarding drug quantity, THAT doesn't really "make any difference" under (or in view of) a properly preserved (below) and timely presented (above) Apprendi objection.

Defendant Terry Young pointed out timely at sentencing (below) and on direct appeal (in the Court) the drug quantity the trial jury did find (none), and the trial jury's determination was (and is) the only one that really matters, and that he should be sentenced for no more than that amount of drugs pursuant to 21 U.S.C. 841(b)(1)(C), to a default statutory maximum penalty for 20 years, see, U.S. v. Nance, 236 F.3d 820, 825 (7th Cir. 2000), on the Count One conspiracy charge. This has been the mandate of federal law since Section 841(b)(1)(C) became law on October 27, 1970, thirty(30) years before Apprendi!

Check the date for yourself.

Finally, in the case of (James) Schlifer, as was in the case of (Wendel) Nance, the only reason the Court applied plain error analysis to their Booker and Apprendi claims, respectively, was because no Sixth Amendment challenge had been raised in the district court. See, Schlifer, 403 F.3d 849, 854 (7th Cir. 2005); U.S. v. Nance, 236 F.3d 820, 82 (7th Cir. 2000). That dispositive fact does not exist in this case.

There is no doubt — the document evidence of record speaks for itself — that defendant Young raised an Apprendi/Jones issue in the district court in a timely fashion, yet the Court still improperly applied plain error analysis. Why?

There is neither doubt nor legitimate reason why the Court should not recall its mandate, correct its error/oversights and conduct a plenary review of the imposed Count One sentence.

Accordingly, for the aforementioned reasons standing alone, defendant Young is entitled to the relief requested and justly deserved, de novo re-sentencing on Count One of the instant indictment.

E. Defendant Young Was Victimized, Unfairly Prejudiced And Discriminated Against By This Court Adopting Inconsistent Judicial Opinions, Reflecting The Application Of Dual Standards Amongst Similarly Situated Criminal Case Defendants, Charged With Virtually Identical Narcotics Conspiracy Offenses

The inconsistencies in this Court's legal opinion conclusions involving the same case subject matter (narcotics conspiracies), and the same case facts (sentencing length enhancements based on

judicial rather than trial jury findings of fact, Apprendi error preservation of rights for review and the standard selection for error [plain v. harmless] review), when the case of Afro-American Terry Young is comparatively analyzed with the cases of other similarly (if not virtually identically) situated criminal defendants, i.e., Wendell Nance, Richard Messino, Clem Messino, Trevor Bjorkman, James Schlifer, Robert Burke, Curtis Smith, Dwight Larson, European-Americans all (not that it really matters in making the intended point), in this same circuit is, simply put, frightening, disconcerting and legitimate cause for grave concern.¹

Judges Rovner (opinion author), Wood and Bauer served on the direct appeal merit panel for Mansoori I, 304 F.3d 635 (7th Cir. 2002), and judges Rovner (opinion author), Bauer and Manion on the remand re-hearing merit panel for Mansoori II, Slip Op. 05-3440 (7th Cir. March 13, 2007)

Consider the following issue illustrations as cases in point:

1. Judicial Admissions

Defendant Young filed with the Seventh Circuit a petition for rehearing on **September 19, 2002**.

The government did not contest Young's assertion that he had

Footnote 1: In referencing his ethnic identity, defendant Young is simply following the lead of the Honorable Circuit Judges William J. Bauer and Ilana Diamond Rovner, respectively, as an acceptable practice, no more, no less. The opening line of the McCaskill v. SCI Management Corp, 298 F.3d 677, 678 (7th Cir. 2002) opinion references Gloria J. McCaskill by race (African-American) and by gender (female). The case was not about racial discrimination per se; it was about sexual harassment, disparate financial compensation (sales bonuses) and employee job termination. They chose to cite ethnicity and gender as factors of relevance.

timely raised a Sixth Amendment argument in the district court and was therefore entitled to relief under Apprendi. Because this is true, the government waived their right to dispute Young's Apprendi claim. An appellate court may not consider a matter which could have been raised in the district court but was not. McKnight v. General Motors Corp, 908 F.2d 104, 107 (7th Cir. 1990). Such rules, of course, apply to the government as well as to the defendant. Wilson v. O'Leary, 895 F.2d 378, 384 (7th Cir. 1990).

Moreover, the government, in opposing Young's petition, in their October 3, 2002 rehearing response brief, represented in relevant part that "The Court's judgement and opinion make clear [a statement of fact] that the Court vacated Young's sentences on all three Counts of conviction" and, "in resentencing Young on Count 1, the district court will of course be obliged to honor Apprendi, and to resentence Young to a maximum of 20 years imprisonment on that count." See, G. Resp. Br. @ 1,2; Mansoori II, Slip Op. @ 6, 9.

In this case (Mansoori II), this panel of judges — Rovner, Bauer and Manion — declared "the government's representations on this subject are besides the point as far as we are concerned." Id. @ 9.

Oh, really? Well, let's examine the Seventh Circuit archives to see what Judges Bauer and Rovner's positions were just 5 years ago in the case of McCaskill v. S.C.I. Management Corp., 298 F.3d 677 (7th Cir. 2002).

Just like the government did on rehearing, SCI conceded a

dispositive point favoring McCaskill's objection at oral argument. Because SCI conceded, the Court need not proceed any further, Judge Bauer held. The verbal admission by SCI's counsel at oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings, Judge Bauer added. Id. @ 680. Judge Rovner declared that Judge Bauer's holding means that "one party's characterization of the law would necessarily bind this court and dictate the outcome of this appeal." Id. @ 683

Well, well, well, what have we here? In Young's case, identical situation, "the government's representations --- are besides the point", but in McCaskill's case, the conceding adversarial party's representation is "a binding judicial admission, which dictates the outcome of the appeal." How about that?

If (or since) Judges Bauer and Rovner's expressed opinions were so (a binding judicial admission) in this case, why was it not so in Young's case? Why was "the government's representation --- besides the point" in just Young's case??

Same judges on the Mansoori II panel as here. But, a different opinion about the same thing for Terry Young. Again, why so for McCaskill, but why no for Terry Young?? Incidentally, another 3 judge merit panel from the Seventh Circuit, Judges Bauer, Coffey and Ripple in another separate case, Keller v. U.S., 58 F.3d 1194, 1198 n.8 (7th Cir. 1995), came to the same conclusion. See also, Soo Line R. Co. v. St. Louis Southwestern Ry. Co., 125 F.3d 481, 483 (7th Cir. 1997)(Judges Posner, Kanne, Evans, same conclusion)

This Court is asked to take judicial notice that 9 circuit court judges have expressed formal opinions contrary to Mansoori II on the judicial admission holding.

In yet another Seventh Circuit legal precedent case, U.S. v. Cunningham, 405 F.3d 497, 503 (7th Cir. 2005), a criminal case, defendant Thomas Cunningham failed to preserve his issue (base offense level enhancements) or assert his right on appeal. Terry Young did both. Cunningham had executed a waiver of the issue and conceded in a supplemental sentencing brief and opening brief on appeal, that the district court properly increased his base sentence. This Court — judges Coffey, Evans and Easterbrook — held that "Such a clear, deliberate and unambiguous concession is sufficient to constitute a judicial admission and evinces an intentional waiver of a right to challenge ---" (citations omitted)." Id. @ 504.

How possibly under the law could defendant Cunningham's concession favoring the government's position, be a judicial admission, but the government's, Young Petition For Rehearing concession favoring Young, not also be same in Mansoori II? This Court's ruling here simply does not pass the "smell" test. It was and is a clear violation of the principle of judicial estoppel. Young's objection and the government's concession was a statement of fact regarding Apprendi's holding.

After the government prevailed (despite its pre-opinion concession) on Young's petition for rehearing, "the government performed an about-face" and withdrew their concession on remand.

See, Mansoori II, Slip Op. @ 7, 9. This Court then permitted this clear violation of well-established Supreme Court law. See, New Hampshire v. Maine, 532 U.S. 742 (2001); Pegram v. Herdrich, 530 U.S. 211 (2000).

The Court's inconsistent judicial opinion with those of a multitude of other Seventh Circuit Court judges, including an opinion by these same judges involving other case defendants, on the subject matter of judicial admissions, was wrong, it unfairly and fatally prejudiced Young's right to fundamental fairness in this case's appeal proceedings.

2. Preservation And Presentation Of Rights For Review

In order for an appellate court to review an issue, generally the appellant must have preserved the claim by making a specific objection at or before trial. See, Turner v. Murray, 476 U.S. 28, 37 (1986). Contrary to Seventh Circuit precedent, i.e., U.S. v. Adkins, 274 F.3d 444, 454 (7th Cir. 2001), even (as here) where Apprendi objections were timely raised below, this Court has consistently applied the (government-favored) plain error standard of review to Apprendi claims, which greatly enhances the prospects for illegal sentences being affirmed.

This Court's opinion in U.S. v. Nance 236 F.3d 820 (7th Cir. 2000) became the first case, the precedent setter, that established the Apprendi rule as new controlling law in the Seventh Circuit. Despite the uncontested fact that defendant Wendell Nance had not timely made or presented an Apprendi claim, i.e., Nance, supra @

824, 825, this Court expressly held that in Wendell Nance's sentencing pronouncement, "error was made (as we have found), and we grant that the error was "plain" and affected the defendant's substantial rights (by increasing the sentence by 22 months)." Id.

This Court in Mansoori I (Young), 304 F.3d @ 657-58, citing Nance, stated that a "mistake must qualify as "plain" before the defendants are entitled to relief" [but] "we conclude that the [Apprendi] error does not constitute "plain" error." Id. Why so in Nance, but why no in Mansoori/Young?? Same judges, same basic facts, different defendants.

The Supreme Court has characterized plain error as error that is "clear" or "obvious", and affects the defendant's "substantial rights." See, U.S. Olano, 507 U.S. 725, 732-33, 734-35 (1993).

Using converse reasoning, the Olano Supreme Court held that if and when an error affects a defendant's substantial rights, it is plain error. Id. See also, U.S. v. Maynie, 257 F.3d 908, 919 (8th Cir. 2001)(error "substantially affected defendant's rights" where correction of error results in a shorter prison terms); U.S. v. Smith, 332 F.3d 455,460 (7th Cir.2003)(An error is harmless if it did not affect the district court's selection of the sentence imposed. Note: Judge Illana Diamond Rovner authored this opinion, joined by judges Posner and Coffey); U.S. v. Schlifer, 403 F.3d 844, 854 (7th Cir. 2005, JJ. Williams, Kanne, Evans)(same as Smith, supra).

If, as the learned jurists who decided and authored the opinions in Olano, Nance, Smith and Schlifer have definitively concluded, that sentencing errors that affect sentencing determinations, i.e., the length of prison sentences, and that affect substantial rights, are "plain" and could never be "harmless", then how could this Court, these same Mansoori I opinion jurists (Rovner, Bauer, Manion) who concluded that the Apprendi error in Nance was plain and did affect Nance's substantial rights (because it increased Nance's sentence by just 22 months), then conclude that Young's clearly preserved Apprendi error claim was not plain, not timely preserved and did not affect Young's substantial rights (in spite of increasing the legally permissible sentence pursuant to Section 841(b)(1)(C) from a 20 year statutory maximum, to an illegally imposed life without parole sentence)??

Address and explain that!

If the truth be told, this Court itself erred egregiously in failing to notice and address Young's Apprendi error preservation claim on direct appeal. This Court error adversely affected Young's substantive rights as reflected in the lengthier sentence imposed for the Count One narcotics conspiracy.

Had the member jurists of the Mansoori I direct appeal merit panel, Rovner (author), Wood (the author of Nance) and Bauer (the author of Larson), exercised sufficient due diligence in researching and examining the material documented (sentencing transcripts and supplemental memorandum of September 22, 1999, the case docket sheets, etc.) evidence of record, they would have known then what they know now - the evidence was there all along - that

defendant Young timely and precisely raised and preserved accurately his Apprendi claim, and perhaps they would have concluded as Judge Bauer (joined by jurists Wood and Ripple) did in U.S. v. Larson, 417 F.3d 741, 747 (7th Cir. 2005), i.e., the defendant (Palmer) raised an Apprendi challenge below, the government had the burden on appeal of establishing that the error was harmless (translated, this means that "harmless error" rather than "plain error" was [there as it is here] the proper standard of review, another error committed by this particular court panel).

The facts, the evidence of record as it relates to the Apprendi rule, in the Nance and Young (Mansoori) opinions, were virtually identical (no amount of drugs charged by indictment, no amount of drugs determined by jury verdict) except in one dispositive respect: Young made a public, perfect Apprendi claim below (referencing Jones v. U.S., 526 U.S. 227 (1999) as the Seventh Circuit held that Nance could have and should have done) to preserve an Apprendi claim, and thus became eligible for relief (a sentence capped by a 20 year default statutory maximum penalty) pursuant to 21 U.S.C. 841(b)(1)(C) .

There is no possible way Young's Apprendi claim could be "harmless", if Nance and Adkins [274 F.3d 444] still are controlling law (and they are) for Apprendi-based claims in the Seventh Circuit.

III. Conclusion

This Court did not address on the merits the timely presented issue of Young being tried, convicted and sentenced under the mandatory guideline regime and in accordance with the Apprendi principle pre-Booker, and the ex post facto clause prohibition implications from not being resentenced accordingly to a maximum guidelines sentence of 51 months, guidelines offense level 12. Young has already been incarcerated twice as long a period. Now, these issues ought to be addressed in this Section 2255 petition.

WHEREFORE, defendant Young prays this Court will grant the relief requested and richly deserved.

Respectfully submitted,

By: Terry Young
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Table of Contents

<u>Subject Matter</u>	<u>Page No.</u>
I. Introduction.....	1
II. Argument(s).....	2
A. The Failure Of The Courts To Comply With Supreme Court And Circuit Court Precedents, Disregarding Intervening Changes In Circuit Law, Ignoring A Congressional Statutory Mandate, All Resulted In A Fundamental Miscarriage Of Justice, Warranting The Count One Vacation Of Judgment Or, Alternatively, Reduction In Sentence Length.....	
B. The District Court Erred In Finding That Defendant Young's <u>Apprendi</u> -like, <u>Jones</u> Objection Was Untimely And Without Merit. The Circuit Court Compounded The Lower Court's Error By Adopting And Not Correcting It.....	
C. Defendant Young Timely And With Sufficient Specificity Made And Preserved An <u>Apprendi</u> Claim Below. Young Is Therefore Entitled To Be Resentenced <u>De Novo</u> On Conspiracy Count One, And This Court's Law Of The Case Doctrine Finding To The Contrary Should Be Set Aside.....	
D. The Circuit Court Erred In Applying Plain Error Analysis To Defendant Young's Timely Preserved <u>Apprendi</u> -like Claim. Young's Claim And Sentence Should Have Been Subject To Harmless Error Analysis And Plenary Review.....	
E. Defendant Young Was Victimized, Unfairly Prejudiced And Discriminated Against By This Court Adopting Inconsistent Judicial Opinions, Reflecting The Application Of Dual Standards Amongst	

Table of Contents

<u>Subject Matter</u>	<u>Page No.</u>
Similarly Situated Criminal Case Defendants, Charged With Virtually Identical Narcotics Conspiracy Offenses.....	
III. Conclusion.....	

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

TERRY YOUNG,
Defendant.

Case No. 97CR63

Judge George W. Lindberg

NOTICE OF MOTION FILING

To: Daniel Rubenstein, Esq. (or whomever acts in his stead)
Assistant U.S. Attorney
219 S. Dearborn Street - Suite 1200
Chicago, Illinois 60604

Please Take Notice that on this 15 day of MARCH, 2008,
the undersigned shall cause to be placed in the legal mailbox at
USP Terre Haute pursuant to Houston v. Lack, 487 U.S. 266 (1988),
for mailing to and filing with the Clerk of the Court, U.S. Dis-
trict Court, Northern District of Illinois, Eastern Division,

**Motion To Vacate, Correct Or Set Aside Sentence
Pursuant To 28 U.S.C. §2255**

service of which is being made upon you.

Respectfully submitted,

By: Terry Young
Terry Young, Pro Se
Reg. No. 02368-424
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

CERTIFICATE
OF
SERVICE

I, the undersigned certify that I placed a true copy of the "Motion to Vacate..." into the U.S. Mail through the inmate legal depository at USP Terre Haute, with full and prepaid postage affixed and addressed to:

Daniel Rubenstein, Esq. (or whomever acts in his stead)
Assistant U.S. Attorney
219 S. Dearborn Street - Suite 1200
Chicago, Illinois 60604

Date

Terry Young
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